Gendered Transitional Justice and the Non-state actor

Chapter 4

Gendered Transitional Justice and the Non-State Actor

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To date, feminist interventions aimed at shaping the field and scope of transitional justice have concentrated on widening the range of harms visible in the process of societal transformation. To this end, activating international accountability and deepening domestic criminalization of sexual violence in times of conflict and societal repression was an early priority.[1] In a similar vein, the feminist agenda has also prioritized exploring the relationship of gender to truth-telling, to amnesty, and to peacemaking. More recently, efforts to engender reparations programs have brought light and heat to a range of harms experienced by women that were typically ignored in prior programs, including loss of the capacity to bear children or the costs of bearing children born of sexual violation.[2] There have been efforts to bring a range of non-physical harms, such as familial separation or forced nudity, within the universe of harms captured by transitional justice.[3] Increasing feminist attention to the category of socioeconomic harms and their disproportionate impact on women is also a feature of contemporary analysis.[4] Feminist critique has consistently focused on the tendency of legal categories to "privatize" such harms—to regard them as apolitical and unrelated to the acts of mass (political) violence for which transitional justice measures seek accountability—thus leaving a broad range of harms that are disproportionately experienced by women outside the purview of transitional justice. The identification of gender patterns in terms of which harms are visible to transitional justice and which are left untouched has been one of the central feminist contributions to the field.

By contrast, feminist interventions have assumed a remarkably narrow set of actors and institutions of responsibility. Many devices common to the transitional justice landscape—amnesty, truth-recovery, international criminal justice,

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1 *See* Kelly Dawn Askin, War Crimes Against Women Prosecution in International War Crimes (1997); Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 Int'l Rev. Red Cross 337 (1985).

2 Ruth Rubio-Marin, *The Gender of Reparations in Transitional Societies*, *in* The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations 63 (Ruth Rubio-Marin ed., 2009); *see also* Colleen Duggan, Claudia Paz y Paz Bailey & Julie Guillerot, *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 Int'l J. Transitional Just. 192, 200-01 (2008).

3 Fionnuala Ní Aoláin, *Sex-Based Violence and the Holocaust: A Reevaluation of Harms and Rights in International Law*, 12 Yale J.L. & Feminism 43 (2000).

4 Christine Chinkin, The Protection of Economic, Social, and Cultural Rights Post-Conflict, Paper for the Office of the High Commissioner on Human Rights' Women's Human Rights and Gender Unit (2008), *available at* http://www2.ohchr.org/english/issues/women.

reconstruction, rule-of-law reform, security-sector reform, and reparations—posit the state as the site and conduit of transition. In this typology, transitional justice is a process by which the state is rendered coherent and legitimate. Feminist interventions in the field of transitional justice have tended to assume the state; the state is seen as the locus for reform and the entity that is most capable of and necessary to delivering transformation for women. Examples of such interventions include advocacy for tougher measures of individual criminal accountability for sexual violence, gender analysis in truth commissions, policy prescriptions for reparations programs, and advocacy for prioritizing an end to gender harms in security-sector reform. We suggest that many of these interventions assume a functional state as the *sine qua non* for successful transition as measured by and for women.

We posit that this singular focus on the state can obscure a range of other important actors relevant to securing transition and may overestimate the extent to which the state is capable of delivering on feminist expectations. In the Colombian case and multiple other contexts, a state-centric focus of transitional justice fails to engage with the practical reality that the state may be fractured and divided and that non-state entities play as much of a role in ending and supporting conflict as does the state. In many contexts, including the Colombian, non-state actors may have "effective control" of territory, may exercise quasi/state-like functions, are recognized as having de facto autonomy, and are brought into peace negotiations and conflict-ending processes on that basis. The imposition of legal norms in such situations may depend on an inconsistent or downgraded matrix of state enforcement in competition or in parallel with appropriation of law or force norms by the non-state actor in their spheres of influence. So, prior to any transition one should not presume that the state has been capable of enforcing law in any meaningful way throughout its sovereign territory—quite the opposite may in fact be the case. We suggest that the quality and extent of state capacity to enforce legal norms prior to a transition and the degree and scope of control exercised by non-state actors are important underlying dimensions that underpin the difficulties in securing legal accountability in transitional contexts in general, and for women in particular. Specifically, in this chapter we assert that greater attention needs to be paid to securing and enforcing accountability mechanisms for gendered violations committed by non-state actors.

This chapter interrogates the framework provided by international law[5] for addressing the gendered violence of non-state actors and is intended as a constructive intervention for feminist efforts to enhance accountability for violence against women. In order to make the groundbreaking legal developments of the past two decades more meaningful for situations of ongoing violence we

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[5] Our focus therefore is on the nature of the Colombian State's international legal commitments as opposed to the domestic criminalization of international law.

must pay greater attention to the limits of the state's reach and consider innovative solutions to better capture harms by non-state actors. To this end, we draw on the paradigmatic case of Colombia to illustrate the gaps in accountability that emerge with respect to violence against women and the non-state actor in armed conflict.

Part I will offer a brief introduction to the gendered gaps of negotiated transition with non-state actors and present the Colombian case as exemplary. In Part II we consider the general regime of accountability under international humanitarian law and focus on how commitments to minimum humanitarian standards might bring greater accountability measures for ongoing acts of violence against women perpetrated by guerrilla groups when the application of international humanitarian law is contested. Part III then deals with imputed state liability for the violence of non-state actors. We focus on the persistent violence of the non-state groups in internal armed conflict situations—particularly violence experienced disproportionately by women—and identify the attendant complexity of holding such groups and individuals accountable during transition. This section concludes by examining how the horizontal application of human rights obligations can be more effectively exploited to secure state accountability for multiple forms of violence against women within demilitarization zones.

I. Gendered Dimensions of Negotiated Transition

For a more considered appreciation of the capacity and limitations of the state, it is important to focus on one foundational aspect of the liberal (democratic) state, and a vision that undergirds the "from" and "to" of many transitional contexts—namely the public/private distinction. The delineation of public and private harms in transitional justice discourse draws on a long genealogy of public and private spheres in liberal political discourse and is critical to the structuring of political transformation. This distinction has had important implications for the types of harms retrospectively identified in transitional justice accounting. In contexts where transitional justice is instituted in the midst of ongoing conflict, gendered distinctions around public and private harms are embedded in the political compromise that underpins transitional justice. The political compromise then shapes the legal and political arrangements that become embedded and normalized in steady-state transitional justice, as the state moves towards its "new" normal.

Transition is defined as a movement away from violence and toward (liberal) democratic statehood. However, the violence to be ended falls within a narrow range of public harms and transition is usually premised on the ending of public communal violence between (generally) male combatants.[6] Paradigmatically

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[6] *See* Cynthia Cockburn, The Space Between Us: Negotiating Gender and National Identities in Conflict (2003).

transitions have frequently been premised on the deal that is struck between the state and non-state actor(s). Peace deals and political compromises that precede transitional justice processes inevitably identify and privilege a particular set of actors, across both the state and non-state spectrum. The exigencies of ending violence often mean that the first test of peace negotiations will be the effectiveness of the process in getting the violent actors around a table and, secondly, party to an agreement. The very outsiders that were deeply involved in violent activities are rewarded by remaking the state and its structures in ways that bring non-state actors, whose support is deemed indispensable and must therefore be earned, into the mainstream. The violence of course invariably involves harms directed towards women. Hence, the "deal" is often a deal for boys and not for girls, as a matter both of substance and representation.

These two realities—the gendered categorization of public/private harms and the enduring influence of the non-state actor in transition—combine to create a particularly precarious security situation for women in contexts of limited or fractured state capacity. While the peace deal may transform relations between violent (generally male) actors, it will likely do very little to transform social relations within zones geographically and politically controlled by violent non-state actors. Further, the political compromise at the heart of the peace deal is based on a clear hierarchy of public over private harms.

Such observations suggest a need to interrogate the composition, capacity, and accountability of the state in transition. Given the enduring influence of the non-state actor, re-establishing the state's monopoly on coercion is secured in practice by bringing the non-state actor within the state. The boundaries of the state are therefore negotiated and negotiable. The state's malleable boundaries create accountability gaps as a matter of principle and practice in international law, which chiefly posits the state as the site and conduit of accountability. In general, across the two most relevant international legal frameworks in transitional settings—human rights law and international humanitarian law (IHL)[7]—there is a regulatory gap or at least a slimmer body of norms that apply to non-state actors than to state actors. In most functional societies, this accountability gap between the state and the non-state actor, while not irrelevant to the general efficiency of the rule of law (and with substantial consequences for women), does not create a massive lacuna in legal regulation. The same cannot be said of transitional societies. In these societies, precisely because the local rule of law may be compromised or degraded and enforcement of "ordinary" rules may be limited, international legal norms are frequently called upon to fill the gap.

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[7] We note that as Colombia ratified the Rome Statute in 2002, though exercising its discretion under article 124 of the Statute to postpone for seven years the jurisdiction of the Court over war crimes committed within the country. Consideration by the ICC may offer a substantive future route for violence against women to be considered.

Equally, the role and influence of the non-state actor (particularly with respect to the infliction of force) will be markedly higher. Thus the presence, centrality, and lack of capture of the actions of the non-state actor are enormously significant, and in our view under-appreciated.

The Colombian case is paradigmatic of such dilemmas and gaps. Six decades of multi-actor and multi-causal violence in Colombia set the backdrop to the contemporary process of transitional justice in the country. Multiple competing actors with both military capacity and political power, operating in parallel or in opposition to the State, have undermined any claim by the State to the monopoly on coercion. Strong regional variations in the country, in terms of wealth, ethnic profile, state presence, and conflict density further erode Colombian claims to statehood. In addition, state institutions are marked by high levels of corruption and low levels of popular confidence. Conflict violence has reinforced popular alienation from the State. The multiplicity of violent state and non-state actors poses particular challenges to securing accountability for violence against women, a form of violence that has traditionally eluded accountability even in settled states.

Colombia is also exemplary of the forms and limitations of scrutiny rendered by the international legal regime applicable to the domain of transitional justice. Colombia is party to the Geneva Conventions and Protocol II as well of nearly all core human rights' treaties. Regional human rights bodies frequently adjudicate on the applicability of human rights norms to the country and to the conflict. Colombia is therefore exemplary of the scrutiny rendered by the applicable international legal regimes relevant to the domain of transitional justice. The "capture" of these legal norms cut across the state/non-state distinction. The nature of the Colombian conflict and the state's international legal commitments make the Colombian case particularly relevant to assessing and addressing the sorts of accountability issues that emerge in a context of transition in which the armed non-state actor(s) has an enduring presence.

Below we discuss expanding and capitalizing on humanitarian law's capture of the non-state actor, the first of our two suggested areas for improvement.

II. Humanitarian Law Accountability and Minimum Humanitarian Standards: Capturing the Harms of the Non-state Actor

The following section (A) describes the nature of international humanitarian law's (IHL) treatment of non-state actors committing gender harms and identifies current gaps in accountability. The second part of this analysis (B) presents three possible targets for feminist intervention.

A. Diagnosis of the Gaps and Current State of IHL

The panorama outlined below reveals a myriad of harms committed against women by non-state actors in conflict situations. Although there is some foundation in IHL for capturing the harms committed by non-state actors and gendered harms, there are important gaps in the framework and norms. Additionally, both states and non-state actors demonstrate a reluctance to accept, or in practice a low level of commitment to, IHL standards. We will address each problem in turn.

1. Harms Suffered by Women in Conflict

It is generally understood that the experience of and fall-out from violent conflict is particularly extreme for many women.[8] There are numerous conflict harms that are suffered disproportionately or exclusively by women, including forced displacement, penetrative sexual violence, sexual mutilation, forced pregnancy, sexually transmitted diseases, sexual dysfunction, and loss of status, social ostracism, or cultural punishment as a result of a perceived loss of purity. Despite a broad swathe of research on the effects of conflict violence generally,[9] we have little good data on the attribution of responsibility for gender-based harms as between state and non-state forces in general, and even less information in the context of specific internal conflicts. We also have limited empirical data on whether different patterns of transgression manifest for women depending on whether it is a state or a non-state actor perpetrating the violence in question. Nonetheless, a broad sweep of journalistic, non-governmental, and anecdotal evidence confirms that women increasingly experience traumatic and widespread violations perpetrated by non-state actors across a wide variety of conflict types and locations.[10]

Particular characteristics of the Colombian conflict have created an acute crisis within the civilian population, specifically for women and girls.[11] Conflict in the country rarely involves direct confrontation between the different armed groups; rather these armed groups settle their scores by attacking civilians suspected of supporting the other side. Although men are the most common victims of summary

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8 *See generally* The Aftermath: Women in Post-Conflict Transformation (Sheila Meintjes, Meredeth Turshen & Anu Pillay eds., 2002).

9 *See, e.g.*, Women in an Insecure World: Violence Against Women Facts, Figures and Analysis (Marie Vlachova & Lea Biason eds., 2005).

10 Secretary-General, *Report of the Secretary-General on Advancement of Women: In-depth study on All Forms of Violence against Women*, U.N. Doc. A/61/122/Add.1 (6 July 2006); Elizabeth Rehn & Ellen Johnson Sirleaf, UNIFEM, Progress of the World's Women Series, Vol. 1, *Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace Building* (2002).

11 UN Special Rapporteur on Violence against Women Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Submitted in Accordance with Commission on Human Rights Resolution 2001/49*, Addendum: Mission to Colombia (1-7 Nov. 2001), U.N. Doc. E/CN.4/2002/83/Add.3 (Mar. 11, 2002).

executions and massacres, violence against women, particularly sexual violence by armed groups, has become a common practice within the context of a slowly degrading conflict and a lack of respect for international humanitarian law.[12]

Abduction of women, detention in conditions of sexual slavery, and forced domestic labor, are characteristic of the treatment of women by paramilitary forces.[13] Survivors explain how paramilitaries arrive in a village, completely control and terrorize the population, and commit human rights abuses with total impunity.[14] Guerilla groups have carried out kidnappings, indiscriminate attacks that affect the civilian population, and arbitrary and deliberate killings of those they accuse of siding with their enemies. They are the principal perpetrators of abduction and forced recruitment of children, infringement of women's reproductive rights, and kidnapping for extortion purposes.[15] Many female combatants in both guerilla and paramilitary forces suffer sexual abuse and infringements of their reproductive rights. Forced contraception, sterilization, and abortion are particularly associated with guerilla groups.[16]

Both groups are responsible for forcible displacement of civilian communities. Colombia has the largest internally displaced population in the western hemisphere, currently estimated at over 3.5 million people. The majority of the displaced are female. These women and girls are subjected to manifold forms of violence. Internally displaced women are at much greater risk of sexual abuse, rape, and being forced into prostitution because of their particular social and economic vulnerability.[17]

2. Humanitarian Law's Treatment of the Non-State Actor and Gender Harms

In contrast to this myriad of violent harms perpetrated against Colombian women by non-state actors, there is a bias to the accountability dimensions of the international legal system whose norms and mechanism do not "catch" these harms. This is not a new observation, nor is it surprising. With its Westphalian roots, the international system was structured around the centrality of states and state actors with evident seepage to accountability. International legal norms, specifically in the field of human rights, give a clear treaty basis on which the contracting state can be held accountable for a wide variety of violations related

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12 *Id.* at 2.

13 *Id.* at 12.

14 *Id.*

15 *Id.* at 14.

16 Amnesty International, Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women 27-28 (2001). For example, Amnesty International reports that, out of a group of 65 girls who had left the guerrillas, all had had intrauterine devices inserted, some against their will and without being given information about the device. *Id.*

17 *Id.* at 29.

to human dignity.[18] International humanitarian law also gives a clear basis for the enforcement of humanitarian norms through the grave breaches system, but it is broadly aimed at States Parties to the treaties.[19] As a result, mechanisms of accountability were primarily designed to capture the actions of state actors consistent with a traditional vertical notion of state responsibility under international law.[20] With the emergence of the non-state actor as a particular threat, most notably in the areas of terrorism, this gap is of increasing concern.

The Geneva Conventions of 1949 were primarily focused on the protection of civilians and *hors de combat*, viewing the state as the primary source of threat to the safety and integrity of such vulnerable groups.[21] By 1979, through the Additional Protocols to the Geneva Conventions, States agreed that certain non-state groups, specifically national liberation movements and similarly situated organizations could be included within the ambit of regulation by the laws of war.[22] However, these included groupings were essentially quasi/state-like or, operating in contexts (colonial or occupation) in which it was generally accepted that political shifts would herald a change in power to governments led by those same non-state groupings. Protocol II Additional to the Geneva Conventions of 1979 expands the accountability orbit by regulating a wider range of internal conflicts, but on more limited terms.[23] As a result humanitarian law has the capacity to directly

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18 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; European Convention on Human Rights, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, *entered into force* July 18, 1978); African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217, *entered into force* Oct. 21, 1986.

19 *See* Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 Mich. J. Int'l L. 783 (1995).

20 *See* J. L. Brierly, The Law of Nations 49-56 (6th ed., 1978).

21 Fritz Kahlshoven & Liesbeth Zegveld, ICRC, Constraints on the Waging of War: An Introduction to International Humanitarian Law (2001), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/p0793.

22 Protocol 1 Article 1 on the General principles and scope of application refers to those "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

23 Protocol II Article 1(1) states that the Protocol applies to

> all armed conflicts which are not covered by Article 1 of [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
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> Article 1(2) notes that the Protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

and indirectly hold some non-state actors to account. This is facilitated by the capacity of judicial bodies to utilize the threshold, organization, and membership criteria of humanitarian law, most often in tandem with the application of human rights norms to the actions of non-state actors that reach the legal threshold for the application of Protocol II.[24]

If humanitarian law were accepted as applicable by all parties in a conflict, there might be some general agreement between states and non-state actors on the norms that cannot be violated and mechanisms in play that would, in theory, address accountability.[25] This would create an agreed ethical and legal context in which breaches would be understood as legal violations potentially subject to sanction. As *The Roots of Behaviour in War*, an authoritative ICRC study, affirms, a core element of preventing violations of the laws of war is to focus more on legal norms rather than on underlying values.[26] So, a starting point for prevention and redress is advancing common agreement between combatants, whether state or non-state, on the applicability of agreed legal rules.

We endorse the principle that creating greater leverage requiring states to affirm the applicability of IHL is a sensible and important mechanism to this end. In tandem we also support greater efforts to encourage non-state groupings to adhere to the norms of the Geneva Conventions (Common Article 3), Protocol I and Protocol II when the conflicts fall within their legal thresholds. Significant buy-in by states, non-state groups, and international organizations of influence to utilize and reference these norms would be progress for the protection of civilians generally, and women specifically.

Despite some provisions, existing norms are not fully adequate to confront women's experiences of harm in internal conflict. In general, IHL's historical neglect of harms experienced by women points to deep and gendered biases in the construction of the law of war.[27] More recently, there has been significant norm augmentation.[28] However, the roots of such additions have been problematically

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24 ICTY, Prosecutor v. Tadic, Case No . IT-97- 1-A, Judgment 172-237 (July 15, 1999) (including inter alia an analysis of the status of conflict finding that the Common Article 3 was applicable to the conflict taking place in the Former Yugoslavia at the time of the violations in question).

25 This speculation is largely theoretical in that few situations of internal armed conflict have applied such norms and little or no accountability has been sought in terms of either domestic or international legal process.

26 ICRC, The Roots of Behaviour In War: Understanding and Preventing IHL Violations (2004).

27 *See* Judith Gardham, *Women and Armed Conflict: The Response of International Humanitarian Law*, *in* Listening to Silences: Women and Armed Conflict 109-25 (Helen Durham & Tracey Gurd eds., 2005).

28 *See* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc S/25704, at 36 (May 3, 1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, U.N. Doc. S/RES/955 (Nov. 6, 1994).

linked to the ongoing connection made between women's purity and honor.[29] As a result, the capture of violations (mostly sexual) exclude or ignore many gendered harms that women themselves might articulate as equally or more harmful.

Although IHL envisages a relatively broad range of actors being "caught" under its rubric, enforcement provisions are less encompassing. Additionally, substantial political and legal obstacles exist to the willingness of states and non-state actors to acknowledge the applicability of IHL norms and in practice buy-in to the standards. Below, we consider obstacles to the application of IHL generally and in the specific context of Colombia.

3. State Resistance to the Application of IHL and Consequences for Women

States have long resisted the application of international humanitarian law norms to the regulation of ongoing internal armed conflicts.[30] States have long felt threatened by granting combatant status to persons who they feel are more appropriately categorized as criminals or terrorists. This has meant that attempts to expand humanitarian law's ambit to encompass non-state groupings has been met by a measure of ongoing hostility by states. Despite this, we suggest that there is room for improvement in compliance with existing norms.

These dynamics apply directly to the Colombian context, where the state has long-resisted the application of IHL. Given that the historic roots of the conflict[31] precede the negotiation of the Geneva Conventions, and more relevantly perhaps the Additional Protocols, the regulatory capacity of IHL has had little to say about (and/or has not deployed to address) the historic roots of conflict and to the methods and means of warfare deployed within it. In parallel with the practice of other states, Colombia has generally sought to eschew the application of humanitarian law, presumably on the basis that it would limit the scope of the State to treat insurgents and non-state actors as criminals under the ordinary legal

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29 The 1977 Diplomatic Conference expanding the protections of the laws of war to enumerated internal conflicts evidenced preoccupation with the fertile and expectant woman. The Conference acknowledged that women had to be given "special protection" because of their "special situation"—including "pregnant women, maternity cases and women who were in charge of children of less than seven years of age or who accompanied them." The only notable movement in the article concerned with "measures in favor of women and children" was the inclusion of the phrase "special respect" for women rather than the term "honor." Also, under Article 75 of the Protocol I rape is included under the general heading of being a crime against "dignity" rather than a crime against "honor." This article also recognized the particular experience of forced prostitution by specifically including its prohibition. The Diplomatic Conference gave little of its attention to the physical violence experienced by women in war.

30 Examples include: Britain in relation to Northern Ireland; Mexico in relation to the Chiapas region; Russia in relation to Chechnya; and Turkey in relation to the North-East of Turkey, where a large Kurdish population is located.

31 The origins of the contemporary conflict are typically located in the civil war (*La Violencia*) of 1948 to 1964.

system. Despite the persistence of the conflict, and the intersection of emergency law and humanitarian law norms in the same period, the conflict has been largely immune to the influence and regulation of IHL.

Presidential peace initiatives in the early 1990s led to the ratification of Protocol II to the Geneva Conventions in 1995 as part of a larger scheme to recognize and address the political grievances of the guerrilla insurgents. In practice, the State's commitment to the application of Protocol II to the guerrilla groups has waxed and waned, in accordance with the faltering progress of successive peace initiatives. The Uribe administration insists that the conflict does not meet the threshold of violence required to engage Protocol II[32] (which is consistent with the practice of other states faced with internal insurgencies and/or non-state collective violence). Nonetheless, it is helpful that the treaty framework includes Protocol II. Recognition leaves space for interaction through the discourse provided by IHL norms on accountability and provides a normative frame of reference for the violations committed.

In terms of sex-based violence, the potential applicability of Protocol II is important. Protocol II includes in its provision of Fundamental Guarantees a prohibition on rape. Relevant also is that in December 1992, the International Committee for the Red Cross, declared that the provisions of Article 147 on grave breaches of the Geneva Conventions included rape.[33] This gives some point of regulatory entry to address the sexual violations experienced by women in Colombia through the legal prism of Protocol II.

However, state reluctance to concede the application of IHL means that a criminalization model is frequently applied (albeit with great tension) to the actions of the non-state actor. Such a model generally struggles to be effective given ongoing competition over territory, legitimacy, and control of political space. A criminalization model generally fails to create any political acceptance or accommodation of the genuine issues of political and territorial dispute that are at the heart of communal violence.

Moreover, in the Colombian case, the relative impotence of the criminal justice system in the face of endemic levels of violence against women is reflected in the staggering levels of impunity.[34] Even with the diminution in the levels of conflict violence in recent years, the criminal justice system has struggled to establish that it is fit-for-purpose for the prevention, investigation, prosecution, and punishment of violence against women. Local women's organizations continue to identify manifold and systemic shortcomings in the criminal justice system, ranging from attitudinal problems of staff who fail to acknowledge violence against women as

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32 *See generally* Mikro Sossai, *The Internal Conflict in Colombia and the Fight Against Terrorism: UN Security Council Resolution 1465 (2003) and Further Developments*, 3 J. Int'l Crim. Just. 253 (2005).

33 International Committee of the Red Cross, *Aide-mémoire on Provision of Article 147* (Dec. 1992).

34 *See generally* Special Rapporteur: Mission to Colombia, *supra* note 11.

a serious social harm, and technical issues around the prosecutors' treatment and use of evidence of sexual violence.[35] Even if the criminal system were capable of addressing cases of violence against women efficiently, individual cases in ordinary jurisdiction would not necessarily serve to expose the systematic and structural characteristics of crimes against women committed as part of the conflict. Criminalization in this perspective functions to blur rather than highlight the need to address the causes of conflict by political negotiation.

Guerrilla groups have on several occasions acknowledged the application of IHL to the Colombian conflict. In 1995, the *Ejército de Liberación Nacional* (ELN) declared that it considered itself to be bound by the 1949 Geneva Conventions and Additional Protocol II,[36] around the same time that the *Fuerzas Armadas Revolucionarias de Colombia* (FARC-EP) made a similar commitment.[37] This acknowledgement reflects a pattern by some established national liberation movements to unilaterally affirm that they are bound by the minimum standards of the Geneva Conventions. Both the African National Congress and the Palestine Liberation Organization have made such declarations in the past.[38] The value of such affirmations does not lie in their formal legal effect because only states can sign the conventions and become parties. Nonetheless, there is significant symbolic value in gaining adherence by non-state actors. First, it may constitute a statement of combatant status and seek to belie their characterization as criminals or terrorists. At the very least, it may suggest that sufficient command and control capacity exists within a non-state organization to enforce the provisions of the Geneva Conventions and Additional Protocols. Second, at least in theory, it holds the non-state actor to a set of minimum obligations and suggests that there is agreement on what norms apply to the conduct of hostilities.

There is, of course, the danger that the apparent acquiescence by non-state actors to the relevance of IHL through minimum standards or even to the treaty provisions is not followed in practice. So for example, despite the FARC's position of unilateral compliance with IHL, a FARC spokesperson informed Human Rights Watch that FARC guerrillas "consider Protocol II and Common Article 3 [of the Geneva Conventions] 'open to interpretation.'"[39] Further, there is compelling

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35 See, for example, Corporación Humanas, Serie Acceso a la Justicia, La Situación De Las Mujeres Víctimas De Violencias De Género En El Sistema Penal Acusatorio (2008); Corporación Sisma Mujer, Entre El Conflicto Armado Y Las Reformas a La Justicia, Colombia 2001-2004 (2005).

36 Human Rights Watch, War without Quarter: Colombia and International Humanitarian Law (1998) (citing Letter from Manuel Pérez, released to the press on July 15, 1995).

37 *Id. See also FARC Rebels say 3 Americans 'Prisoners of War'*, CNN, Feb. 24, 2003, http://www.cnn.com/2003/WORLD/americas/02/24/colombia.us.hostages.reut/index.html (discussing FARC's official position that American hostages taken during the course of its conflict with the Colombian government are regarded as prisoners of war under international law).

38 *See generally* Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, Journal of Humanitarian Assistance (Apr. 2004), http://www.jha.ac/articles/a132.pdf.

39 Human Rights Watch, *supra* note 36.

evidence of routine non-compliance with IHL by the armed group.[40] The danger in the Colombian context, as in others, is that non-state actors who have not been involved in the negotiations of treaties limiting the methods and means of warfare, and whose operations and training are not systematically influenced by the need to respect IHL, may simply view professions of adherence to IHL norms as having political currency but no practical constraining effect.[41] Voluntary adherence may mean very little in terms of general accountability and have little or no meaningful effect on the behavior of the non-state actor. This requires close attention if we are, as this chapter suggests, to close the non-state accountability gap in situations of armed conflict as a means to better protect women's human rights.

B. Proposed Areas for Feminist Intervention

In light of the current panorama described above, we now propose three potential areas for feminist interventions to improve the use of IHL norms to increase accountability for and protection from gendered harms: (1) advocacy for an expanded conception of the threshold of violence test that might reflect more accurately the reality of contemporary conflicts; (2) engagement with human rights bodies that draw on IHL rules in their human rights monitoring and adjudication; and (3) promoting the acceptance of minimum humanitarian standards for all actors.

1. Defining the Subject of IHL: The Threshold of Violence Test

Another related and controversial issue is the definition of subject in the field of humanitarian law. Humanitarian law requires a sufficient threshold of violence to be activated,[42] a control of territory requirement, and other measures of the degree of organization (command and control responsibility sufficient to disseminate international humanitarian law) sufficient to don the privilege of combatant (and also prisoner of war) status. When these thresholds tests were conceived, whether in the post-World War II period or the decolonization and Cold War context of the late 1970s, particular conceptions of conflict were in play. Concretely, the rules responded to the conflicts of the time. In many conflicts the

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40 *See generally* Human Rights Watch, *supra* note 36; Human Rights Watch, Beyond Negotiation: International Humanitarian Law and its Application to the Conduct of the FARC-EP (2001).

41 *See* Human Rights Watch, *supra* note 36.

42 Protocol II, Article 1(1):

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 … shall apply to all armed conflicts which are not covered by [Protocol 1] . . . and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

splintering of internal conflict and the proliferation of armed groups mean that the threshold requirements of IHL are ill-fitted to the contemporary reality of violence and the disintegration of the state that has accompanied it. The requirements are also ill-equipped to address the forms of violence in which targeting women constitutes a specific method and means of warfare.

The proliferation of armed groups has characterized the Colombian conflict: innumerable and overlapping guerrilla, paramilitary "self-defense", and narco-trafficking groups. It may be that the threshold of violence sufficient to activate humanitarian law application requires greater contemporary contextualization—for example multiple and splintered violent actors in sum rather than the measure of one group's effect on overall violence.[43] Alternatively, the threshold of violence measure could be horizontally calibrated over time as a cumulative test, rather than a vertical test in which a conflict has to satisfy a threshold test at a particular pinpoint moment. With the violence experienced by women squarely to the fore, what "counts" as violence for the purpose of measuring the intensity of the conflict demands fundamental revision, specifically the inclusion of a range of acts currently considered to fall within the private sphere. Gendered violence needs to be counted as conflict-related or -caused violence. If this were to be the case, a fuller and deeper accounting of gendered violence would count into the assessment of what constitutes an armed conflict and—importantly—what constitutes the end of an armed conflict.

We note that, in a non-judicial context, a deeper accounting of gendered violence has found expression in the Colombian transitional justice process. The Historical Memory Group, a creation of the National Reparation and Reconciliation Commission established under the Justice and Peace Law, has been impressive in its willingness to use a gender perspective to challenge the very terms of its own investigation. Thus in its report on the massacres experienced by the town of Trujillo, the terms "before" and "after" the massacres are acknowledged to be misleading terms when one considers that gender-based violence pervades normal life in the town.[44] In the section dealing with the memories of women victim survivors, the report brings out women's gender-specific experiences of violence and discrimination within families in the area, concluding that:

> [M]any of the accounts that emerged about "before the massacre" and ordinary life demonstrate how the lives of women proceeded within practices of violent masculine domination. . . . For them, the "before" does not appear to have been an idyll of peace and respect for their rights in the domestic ambit.[45]

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43 For a more detailed exposition of this position see Fionnuala Ní Aoláin, The Politics of the Force: Conflict Management and State Violence in Northern Ireland (2000).

44 Comisión Nacional de Reparación y Reconciliación, Grupo de Memoría Historica, Trujillo: Una Tragedia Que No Cesa 220 (2008).

45 *Id.*

This section also highlights the role of the violence in determining relations between men and women and the negative constructions of masculinity and femininity in the community—the privileging of violent masculinity and "the profound devaluation of the feminine" in the violent context of Trujillo.[46]

Thus, in aspects of the transition less clearly determined by the imperatives of international law, an alternative narrative of understanding the violence—an understanding inclusive of women's experiences—has found expression. The international legal framework must be challenged to include this type of probative accounting for gendered experience in order to more accurately define the violence to be included in accountability and reform efforts in the aftermath of conflict.

2. IHL Monitoring and Enforcement by Regional Human Rights Bodies

International and regional practice in relation to the applicability and effect of international humanitarian law norms on non-state actors is complex and challenging. The Inter-American system is generally recognized as being one of the most sophisticated human rights regimes with regard to its acceptance of the relevance of humanitarian law to the interpretation of human rights, as well as its judicial acceptance that in some of the countries in the region, humanitarian law rather than human rights may be the more fitting frame of reference.[47] Both the Inter-American Commission and Court have endeavored to negotiate the appropriate exercise of their human rights mandate within the context of the Colombian armed conflict. The Commission's "bullish"[48] attempts to enforce international humanitarian legal norms in the 1990s were reined-in by the Court in the *Las Palmeras* decision, in which the Court admitted that neither it nor the Commission was competent to apply the Geneva Conventions.[49] Nevertheless, the Court held that both bodies are competent to draw on the Geneva Conventions whenever necessary to interpret a rule of American Convention.[50] The Court has reiterated this position several times in respect of the Colombian conflict.[51]

In this manner, the Court and Commission have been able to ensure a measure of indirect application of international humanitarian law to the Colombian conflict. However, this indirect application of IHL applies only to state acts and does not

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46 *Id.* at 229-30.

47 James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court*, 102 Am. J. Int'l L. 768 (2008).

48 This is the categorization of the Commission's approach in Lindsay Moir, *Decommissioned? International Humanitarian Law and the Inter-American Human Rights System*, 25 H.R.Q. 182, 205 (2003).

49 Las Palmeras v. Colombia, Preliminary Objections, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000).

50 *Id.*

51 *See, e.g.*, Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, para. 155 (Sept. 15, 2005).

cover violations of humanitarian law by the non-state parties to the conflict. Accordingly, the Inter-American Commission decided in its Third Report on the Situation of Human Rights in Colombia (1999)[52] that it would not investigate or hear individual complaints concerning acts by armed opposition groups, for which the Colombian State is not responsible.

The approach of the Commission to its broader country reporting is notably distinct from its methodology for reviewing individual petitions. The Commission does apply IHL to armed opposition groups in its country reports. Country reporting has been framed by reference to IHL and human rights law for both state and non-state actors. Although this methodology does not suggest any degree of equality in accountability and responsibility between the entities under review, it is valuable for bringing light and public scrutiny to non-state actors. Clearly, however, these reports do not provide individuals with remedies against violations of humanitarian rules vis-à-vis these actors. The differentiated standing of the different actors reveals accountability gaps, including the extent to which there are fora in which violations can be directly litigated. Despite and in response to these limitations, we emphasize the importance of both horizontal accountability (see below) and the use of humanitarian law as a measure in assessing responsibilities in the country-reporting context.

3. The Promise of Minimum Humanitarian Standards

In the context of internal armed conflicts we are convinced that the body of legal norms best placed to encompass the existing accountability gap is humanitarian law. In our view, greater acceptance by states that Common Article 3 provides a minimum set of standards by which the actions of both state and non-state actors should adhere would be a considerable advance in general, and provide many positives for women who experience violence in situations of internal armed conflict. We appreciate that the explicit lack of recognition for gendered violations in Common Article 3 is a limitation. Nonetheless, its "minimum standards" approach and the capacity of interpretative application gives it potentially greater reach that any other agreed instrument. But given some of the regulatory difficulties that IHL has traditionally encountered we encourage thinking again about the contribution that minimum humanitarian codes might make, with a view to gendering such codes to avoid duplication of existing biases in domestic and international criminal law.

When states have been unwilling to apply treaty norms, and non-state actors have seen themselves as excluded from IHL treaty provisions, codes of conduct for states experiencing hostilities have been offered as a way forward to ensure

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[52] Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, doc. 9 rev. 1 (Feb. 26, 1999).

some minimal set of legal obligations are observed by all parties.[53] These codes are intended to sidestep the fraught political issues of conflict status and allow basic regulatory provisions to be deemed relevant by all parties to the conflict. We think that they deserve further and more detailed attention as a means to address normative rules and accountability, as well as to focus attention on the violations experienced by women as breaches of humanitarian norms. To that end, however, we also accept that such codes require substantive augmentation in order to avoid duplication of the problem of "under-capture" that we ascribe to international and domestic criminal law.

Practically, how would the codes be activated? Gasser makes three observations on the threshold that should be met in order to trigger their applicability: first, the degree of violence exceeds normal times; second, the violence is overt not covert; and third, the situation is characterized by general violations of the fundamental rights of the individual.[54] Meron, commenting on the suitability of a Humanitarian Declaration on Internal Strife emphasizes the characteristic of collective violence[55] as distinguishing internal disturbances and tensions from other violent situations.[56] In this sense, we believe such codes can address those multiple contexts (Colombia as representative) where the state does not concede or concedes only in part the applicability of humanitarian law, and where the domestic criminal law is inadequate to capture the nature of the harms and may be implicated in the broader dysfunction of the state's institutions.

These codes can serve a number of useful purposes, and we think they may be an important tool for policy makers and governments in contexts where states accept in practice (de facto) but not in law (de jure) that a situation of armed

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53 Hans Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, 28 Int'l Rev. of the Red Cross 38 (1988). Gasser states that the aim of such rules is to reduce human suffering, the object of the code being both authorities and non-state actors alike.

54 *Id.* at 41.

55 The ICRC also echos this theme of "collective violence." The President of the ICRC has stated:

> The situation of the individual caught up in violence in a State, violence that ranges from simple internal tensions to more serious internal disturbances, is a cause of deep concern to the ICRC. A suggestion was made recently to draft a declaration of basic and inalienable rights applicable to cases of collective violence within the States, in situations that would not already be covered by humanitarian law.

Alexander Hay, *The ICRC and International Humanitarian Law,* 23 Int'l Rev. of the Red Cross 3, 9 (1984).

56 Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife,* 78 Am. J. Int'l L. 859 (1984). An important prescriptive element of these codes of conduct is that they lack one significant requirement of their armed conflict cousin. That is, no necessary degree of organization is required by third parties in order to activate the codes in question. The sole exception to this is the Turku/Abo Declaration which while prohibiting murder and violence to the person also provides that "whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved." Turku/Abo Declaration of Minimum Humanitarian Standards, art. 7 (1990).

conflict exists. Again, drawing on the *Roots of War* study,[57] we endorse the position that normative reference points are critical to preventing the violation of humanitarian norms. Moreover, this study attests that in situations of armed conflict, violations of IHL involve "social and individual processes of moral disengagement" compounded by group conformity and obedience to authority.[58] Where formal application of IHL by all parties may prove elusive, agreement to normative standards may in itself (particularly where chains of command in organizations adopt and enforce) be a powerful deterrence tool. Second, a key element in preventing violations lies in ensuring that the bearers of weapons are properly trained. In the absence of agreed treaty rules, minimum standards may provide the backdrop to training. If codes are tied to strict and effective sanctions whether by the state or the non-state military structures, they potentially mitigate the use of violence against women as a method and means of warfare. Third, as the influence and value of soft law deepens, we should not underestimate the extent to which minimum standards may crystallize and become "hard" binding norms over time.

Even in the context of minimum standards, identification and agreement on the amount of violence required is crucial. There is no mathematical equation that sets a pre-agreed limit on the amount of acceptable violence in any particular state. Self-evidently, cultural practices and developmental and financial capacity make any such assessment subject to enormous disparities. An obvious starting point is a determination of the source(s) of violence. This requires collating and attributing the sources of violent behavior within each state. Often the starting point of assessment is the normal levels of criminal activity as measured by statistical indicators of violence within that state. Again we stress the evident bias in such collation that excludes "normal" levels of violence against women. Such structural deficiencies must be addressed in order to avoid humanitarian standards duplicating the exclusion of gendered harms. In addition, the matter becomes more complex as state discretion on what is termed criminal activity is exercised.

It is nonetheless significant that there is movement towards a definition of "internal disturbances and tensions" that would be sufficient to apply across a range of conflicts. In this context, we emphasize the importance of including the range and depth of violence experienced by women as part of the calculation. The danger is that narrow definitions, based on ever-present public/private distinctions, may mean that gendered presumptions are simply moved from one arena to another.

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57 ICRC, *supra* note 26, at 4.
58 ICRC, *supra* note 26, at 2.

III. Imputed State Liability for the Violence of the Non-state Actor

The key issues addressed in this section focus on the means by which the actions of the non-state actor can be captured by the legal obligations taken on by the State under international law. The concept and practices of imputed state liability are critical to addressing the degree and capacity for state legal obligations to capture harms committed by the non-state entity. We assess these issues by focusing on violence against women through the prism of disarmament, demobilization, and reintegration (DDR) processes that almost invariably accompany the post-conflict process.

A. DDR, the Post-Conflict Process, and Gendered Outcomes

The Justice and Peace process has given rise to a set of problems in Colombia that are familiar to those who write and research more generally on violence against women as it manifests at the end of conflict. Processes of disarmament, demobilization, and reintegration of combatants are increasingly central to efforts to build sustainable peace in the aftermath of violent conflict.[59] Without ignoring the presence of women in combatant forces or the prominence of men in civilian populations, there is nevertheless an often unspoken gender piece to DDR: namely, that the process involves the reintegration of a largely male (former) combatant group into a disproportionately female civilian population. By and large, DDR processes are directed at societies in which there have been significant non-state sources of violence. The gender differential between returning and receiving communities means that, although DDR is officially concerned with ensuring the conditions that enable former combatants to cease violence and return to their communities of origin, DDR can also ignite a series of new challenges for women's security within the community.

In order to illustrate some of the "new" gender dynamics of violence that can accompany processes of DDR, it is instructive to draw on empirical research conducted by Colombian women's organizations examining the impact of DDR on the lives of women living in the rehabilitation and consolidation zones. Based on analysis of the short- and long-term impacts, such research has regarded the process of reintegration under the terms of the Justice and Peace Law as a threat

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[59] *See, e.g.*, U.N. Dep't of Peacekeeping Operations, Lessons Learned Unit, *Disarmament, Demobilization and Reintegration of Ex-combatants in a Peacekeeping Environment: Principles and Guidelines* (2000)*;* Mats R. Berdal, Int'l Inst. for Strategic Stud., ADELPHI Paper 303, *Disarmament and Demobilization after Civil Wars: Arms, Soldiers and the Termination of Armed Conflicts*, at 9 (1996); Kimberly Mahling Clark, USAID, Fostering a Farewell to Arms: Preliminary Lessons Learned in the Demobilization and Reintegration of Combatants (1996); Mark Knight, *Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace*, 41 J. Peace Res. 499 (2004).

to the security of women. Early on in the DDR process, women's organizations monitoring the reintegration process in Tierralta, Córdoba identified an increase in levels of prostitution, sexually-transmitted diseases, and teenage pregnancy.[60] They noted alarming increases in levels of domestic violence, as relationships were forged or reignited between former combatants and members of the civilian population.[61] In this catalogue of harms we directly confront the material consequences of the public/private distinction in transitional justice. Teenage pregnancy, poor sexual health, and domestic violence fall within the sphere of private harms. Perceived as unrelated to the public violence of paramilitary groups, the proliferation of such harms against women does not inform political calculations of costs and benefits in the negotiation of demobilization. The broader problem is the evident disconnect between the planning of DDR programs—as well as the benchmarking of their success—and the lived experience of women in the receiving communities.[62]

Compounding the gendered gaps of a gender-blind DDR process is the weakened and fractured nature of the state operating in the backdrop to the non-state demobilization. In this telling, the lack of central state capacity to fundamentally affect the "on the ground" experience of DDR, means that our assumptions about the capacity of the state to control and prevent violence in the transitional context are significantly undermined. The weak state presence has meant that absolute impunity surrounds the violence experienced by women in the "post" conflict phase.

Equally, DDR does not mean the re-establishment of the state or the legitimacy of its institutions. This is demonstrated in part by the ongoing evidence of political influence by former paramilitaries going largely unchallenged. Returning combatants have displaced civilian population from paid work and political leadership within receiving communities.[63] Leaders of women's organizations have been targeted for paramilitary violence and assassination.[64] In the longer-term, the DDR process has been criticized by women's organizations for institutionalizing paramilitary influence and power within the demobilization zones, such as Villavicencio, southeast of Bogotá.[65] The disarmament process was highly partial and largely inadequate. Large numbers of the demobilized have returned to criminal activities. One influential women's organization concluded that the ongoing economic, political, and military

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60 Corporación Humanas, Riesgos para la seguridad de las mujeres en procesos de reinserción de excombatiente: estudio sobre el impacto de la reinserción paramilitar en la vida y seguridad de las mujeres en los municipios de Montería y Tierralta departamento de Córdoba 67 (2005).

61 *Id.* at 73.

62 Fionnuala Ní Aoláin, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, 31 Hum. Rts. Q. 1055 (2009).

63 Corporación Humanas, *supra* note 60, at 44.

64 Corporación Humanas, *supra* note 60, at 44.

65 Corporación Humanas, Mujeres entre Mafiosos y Señores de la Guerra: Impacto del proceso de desarme, desmovilización y reintegración en la vida y seguridad de las mujeres en comunidades en pugna (2008).

influence of "demobilized" groups was perpetuating paramilitarism in the country, as young men aspire to the status and power of paramilitaries and young women aspire to be with them (a fact graphically illustrated by the alarming rates of teenage pregnancy in the area).[66] Criminal activities and the limitation of political expression fall more readily within the sphere of public harms in transitional justice. Evidence of public harms resulting from DDR poses challenges to transitional justice in Colombia, even on its own narrowly stated terms of ending the public violence of paramilitary groups.

These results require us to rethink the form and terms upon which DDR programs are negotiated, as well as the basis upon which they are deemed successful. But, more pertinently, they mandate thinking through the conundrum of legal responsibility for the failure of DDR and the locus of responsibility for the violence that continues against women in the aftermath of conflict. When the conflict is theoretically ended by the state, but the non-state actor continues to exercise violence, albeit now in the theoretically private sphere of violence against women and non-political criminality, where does legal responsibility lie?

B. The Non-state Conundrum and the Feminist Response

The posture of many Colombian women's organizations toward paramilitary forces reflects a more general posture of feminists towards non-state actors. The non-state actor is identified as masculine, and in the context of conflict and repression as portraying hyper-masculine traits,[67] as well as an inherent and unreformed patriarchy that negatively impacts on women. The non-state actor is viewed as unpredictable and unconstrained, and it is unclear to feminists (as it is to other theoretical approaches),[68] how the non-state actor is to be held accountable for his actions, specifically as they affect women. This lack of predictability and stability may explain feminist unwillingness to expend significant theory, policy, or advocacy attention to non-state entities.

Connectedly, any discussion of feminism and the non-state actor mandates acknowledging the theorizing and policy that has emerged from women's engagement with national liberation movements. In parallel, the status of women within, and the relationship of feminism to, national liberation movements has seldom led to a direct feminist engagement with such entities.[69] In general

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66 *Id.* at 52.

67 *See* Kimberly Theidon, *Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia*, 1 Int'l J. Transitional Just. 66 (2007); Nira Yuval-Davis, Gender and Nation (1997).

68 See, for example, on the challenge of non-state actors to traditional approaches to security studies, Steve Smith, *The Increasing Insecurity of Security Studies: Conceptualizing Security in the Last Twenty Years*, 20 Contemp. Security Pol'y 72 (1999).

69 See, for example, Gender and National Identity: Women and Politics in Muslim Societies (Valentine M. Moghadam ed., 1994).

feminists have identified the complex paradox that frequently results from women's involvement in national struggles. The involvement of women as combatants in national liberations movements, and the more mundane work of women in reproducing[70] and sustaining the boundaries on which such movements depend,[71] has given rise to this largely negative feminist assessment. Pragmatic acquiescence to women's engagement is balanced by an unwillingness to assume that a reformist agenda will transform such movements. As a result reformist attention remains firmly focused on the state. Notably the category of women combatants (or even women as tacit supporters of violence) poses particular quandaries theoretically and practically to this body of feminist work. Various scholarly disciplines are pervaded by the "assumption that women are generally more peaceful and less aggressive or warlike than men."[72] Generally speaking, the quantification of and rationale for women's political violence are grossly under-researched arenas across academic disciplines.[73]

This paucity of research is tied to complex social conventions about the role of women in the military apparatus of the state, or any roles that women may play within non-state structures in conflicted societies. Here also "the prevalent view of women as victims of conflict . . . tends to overlook, explicitly or implicitly, women's power and agency."[74] This blind spot tends to produce policy and practice that views women as homogeneously powerless or as implicit victims, thereby excluding the parallel reality of women as benefactors of oppression, "or the perpetrators of catastrophes."[75] Moreover, women's active roles in national or ethno-national military organizations is defined by deep ambiguity linked to resonant debates about the identity of nation, the meaning of citizenship, and the complex interface between cultural reproduction and gender roles in any society.[76] Nevertheless, the poor correlation between levels of women's involvement in combatant activities

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70 *See generally* Yuval-Davis, *supra* note 67.

71 *See*, for example, Begoña Aretxaga's work on women and nationalism in Northern Ireland: Begoña Aretxaga, Shattering Silence: Women, Nationalism, and Political Subjectivity in Northern Ireland ix (1997) ("Women are the backbone of the struggle; they are the ones carrying the war here.").

72 Miranda Alison, Women and Political Violence 1 (2008).

73 In the sometimes related sphere of human trafficking, see for example, Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, 21-25, U.N. Doc. A/HRC/4/23/Add.1 (2007), which sent shockwaves through the community of persons interested in, but not intimately knowledgeable about human trafficking, when it named women as traffickers.

74 Simona Sharoni, *Rethinking Women's Struggles in Israel-Palestine and in the North of Ireland*, *in* Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence 86 (Caroline Moser & Fiona Clark eds., 2001).

75 Ronit Lentin, Gender And Catastrophe 12 (1997).

76 *See* Yuval-Davis, *supra* note 59. See also the assessment of the position of the 20,000 odd women who fought in the Marxist Eritrean People's Liberation Front, whose return back into a deeply patriarchal society has been fraught on numerous levels, James C. McKinley, *Eritrea's Women Fighters Long for Equality of War*, The Guardian, May 6, 1995.

and the status of women in postcolonial states[77] bears out Cynthia Enloe's assertion that national liberation movements tend to adopt a position of "not now, later" in respect to women's equality.[78] In parallel, one element of murky results for women in the post-conflict context is that the involvement of women in securing liberation/gaining independence gives little clear correlation to accountability for gendered violations committed in contribution to that political outcome.

This largely negative feminist assessment of non-state actors has, in turn, tended to cast the state in the role of "protector," as the guarantor of liberal legal rights to equality and non-discrimination. Although imperfect, the state's de jure guarantees of equality offer greater protection and greater leverage on decision-making within the state than within any of a range of non-state actors. But, in simple terms of numerical presence, women remain vastly under-represented within the state;[79] and empirical research demonstrates the cross-regional truth that women's political activity is concentrated within local civil society organization.[80] Nevertheless, for women's movements seeking to make political gains, their advocacy is remarkable consistent in targeting the state. We do not doubt the value and importance of that endeavor. The state is and will remain a legitimate site of feminist activity and feminist gains. However, we suggest, as the analysis above begins to explore, that in tandem feminists must also be concerned with the non-state actor and seek to influence their actions and institutional structures. Below we explore how non-state actors' actions can be influenced by pursuing state accountability for gendered violence perpetrated by non-state groups. We suggest that, raising the political and legal costs to states for public and private forms of violence against women by non-state entities will motivate states to better ensure the physical integrity of women while negotiating political compromises.

C. Due Diligence as a Method to Influence the Non-state Actor

The privileging of the state is a point of concurrence between feminist interventions into transitional justice and the organization of international human rights law. States assume human rights obligations and accountability for human rights violations by treaty. Traditionally, these obligations were understood to govern the vertical relationship of states to citizens. However, the developing doctrine of

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77 For discussion of these dynamics in the Eritrean and Colombian cases, respectively, see Patricia Campbell, *Gender and Post-Conflict Civil Society*, 7 Int'l Fem. J. Pol. 377 (2005); Luz María Londoño F. & Yoana Fernanda Nieto V., Mujeres No Contadas: Procesos De Demovilización Y Retorno a La Vida Civil De Mujeres Excombatientes En Colombia 1990-2003 (2007).

78 Cynthia Enloe, The Morning After: Sexual Politics at the End of the Cold War (1993).

79 See, for example, the number of women in the parliaments of the world, available at the website of the Inter-Parliamentarian Union, http://www.ipu.org.

80 *See* The Challenge Of Local Feminisms: Women's Movements In Global Perspective (Amrita Basu ed., 1995).

due diligence has introduced the notion of horizontal application of human rights, namely that human rights also bind the relationship between citizens. In practice, this accountability is affected through the state. Due diligence obligations require states to protect an individual's human rights from violations by another private individual. Due diligence doctrine has been one of the most significant developments in making international human rights law relevant to women's daily experiences of violence.[81] The articulation of states' duties to prevent, prohibit, investigate, and punish crimes of violence against women—predominantly occurring within homes and communities, at the hands of private actors—has been critical.

In transitional contexts, in which the state is fragile and mass crimes of violence may persist, there can be a struggle to make due diligence obligations pertinent to violence against women. Nevertheless, violent conflict does not exempt states from their due diligence obligations. And as we examine here, an important body of law exists for advancing accountability, much of it directly relevant to the Colombian context. With an eye toward gendered violence accompanying a failed or deficient DDR process, we trace several major legal developments that, when read together, support the expansion of state accountability for non-state actors, including: broader acceptance of gendered harms in traditional norms in due diligence requirements; extension of state responsibility to non-state actors for public harms; and due diligence analysis applied to private harms as discrimination.

1. Capturing Gender-based Violence

The Inter-American human rights system has been one of the most progressive in its codification of the right of women to live free from violence. The Inter-American Convention of Belém do Pará, adopted in 1994, remains the only binding international human rights instrument dedicated to the prevention, punishment, and eradication of violence against women.[82] The Convention includes a mechanism for the communication of individual complaints to the Inter-American Commission.[83] While the Inter-American Court has been more conservative in its jurisprudential development of women's rights to live from free from violence,[84] recent decisions signal an important new trajectory.

The 2006 decision concerning the sexual abuse of women detainees in the Peruvian Miguel Castro-Castro prison has set an important marker in the

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81 *See* Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, 25 Stud. Transnat'l Legal Pol'y 93 (1993).

82 Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belem do Para", June 9, 1994, 33 ILM 1534, *entered into force* Mar. 5, 1995.

83 *Id.* art. 12.

84 *See* Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 Tex. J. Women & L. 228 (2008).

recognition of gender-specific forms of inhuman treatment.[85] Acts such as being surrounded by security forces while required to strip and remain naked for an extended period, being prohibited from showering, being accompanied to the bathroom by male guards, and denial of post-partum medical attention, were recognized as constituting "inhuman treatment" in violation of the American Convention on Human Rights.[86] Given that these human rights violations were perpetrated by state actors, within a state institution, the decision coheres with the traditional state-centric nature of human rights.

The State was found to be in violation of its due diligence obligations to investigate alleged cases of torture.[87] Further, in awarding reparations, the Court made specific consideration of the different types of violence to which the women were subjected.[88] Finally, the decision marked an important precedent in establishing the justiciability of the Convention of Belém do Pará. While the Peruvian government argued that the communications alleging violations of rights guaranteed under the Convention could only be considered by the Inter-American Commission,[89] the Court found the State in violation of its Article 7(b) obligation to investigate and punish violence against women. Read together, these different aspects of the Court's decision reiterate states' duty to prevent, punish, and eradicate violence against women; to investigate allegations of torture, including gender-based forms of sexual torture of women; and to appropriately compensate female victims of sexual violence. This language lays a strong foundation for the application of such principles in many other contexts, including horizontally to non-state actors.

2. Imputed State Liability for Paramilitary "Public" Violence

While the *Miguel Castro-Castro Prison* case concerned directly state-perpetrated violence against women, innovative jurisprudence by international courts and tribunals has increasingly found that a state may be held responsible for the actions of private actors when it fails to set appropriate regulatory standards, encourages non-enforcement of the relevant legal norms, or minimizes sanction.[90] The Inter-American Court has led the international human rights community in its imputation of state liability for violations of human rights by private parties.[91]

Here the Court's jurisprudence has specifically addressed the Colombian State's liability for human rights violations perpetrated by paramilitary groups

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85 Miguel Castro-Castro Prison v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006).
86 *Id.* para. 197.
87 *Id.* para. 347.
88 *Id.* para. 432.
89 *Id.* para. 379.
90 *See generally* Andrew Clapham, Human Rights Obligations of Non-State Actors (2006).
91 *See especially* Velasquez Rodriguez v. Honduras, 1988 Inter-Am.Ct.H.R. (ser. C) No. 4 (July 29, 1988).

based on the degree of ties between parts of the State and certain groups.[92] The paramilitary and political activities of the paramilitaries continue today,[93] and the Inter-American Court has held the Colombian State accountable for many of the most serious public harms of the paramilitaries which occurred during the conflict. For example, in the *Mapiripán Massacre* case, the Court found the Colombian State responsible for the abductions, torture, and killings committed by the paramilitary or self-defense groups, due to the "link between the armed forces and this paramilitary group to commit the massacre . . . conducted in a coordinated, parallel or linked manner."[94] This linkage allied with an emphasis on due diligence remains critical to the protection of women in situations of armed conflict. The Court's decision in the *Mapiripán Massacre* case can be read together with the *Miguel Castro-Castro Prison* decision to impute liability to the Colombian State for the alarming levels of public harms against women, such as the assassination of leaders of women's organizations, perpetrated by paramilitary forces.

3. International Human Rights Law and Capturing "Private" Harms

One important theoretical frame in examining the violence experienced by women is the public/private divide and how that intersects with the state/non-state paradigm. The implications for women of the public/private divide have been well documented by feminist scholars.[95] Law's oversight of the private domain is purposely constrained, and that deemed private remains effectively out-of-regulatory-bounds. The difficulties of the public/private divide applied to the state and non-state continuum are to some degree self-evident. Regarding the application of international law norms, the state is evidently held to the treaty standards of human rights enforcement when violations take place in the public sphere and involve a state official.

Horizontal application of human rights norms has been highly relevant to women seeking to "catch" violations taking place in the private sphere. In particular, jurisprudence of the European Court of Human Rights,[96] and the growing body of jurisprudence of the CEDAW Committee, have focused on the elaboration of states' due diligence obligation to prevent, prohibit, investigate, and punish acts of

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92 *See, e.g.*, Mapiripán Massacre v. Colombia, Merits, Reparations and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

93 Gustavo Duncan, Los Señores de la Guerra: De Paramilitares, Mafiosos y Autodefensas en Colombia (2006).

94 *Mapiripán*, *supra* note 92, para. 123.

95 Feminist theorists have long articulated that the most pervasive harms to women tend to occur within the inner sanctum of the private realm, within the family. *See* Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (2006).

96 M.C. v Bulgaria, [2003] ECHR 39272/98 (Dec. 4, 2003); Opuz v. Turkey, [2009] ECHR 33401/02 (June 9, 2009).

so-called private violence, in particular, domestic violence.[97] Importantly, within this articulation of states' due diligence obligations, impunity for violence against women has been explicitly recognized as discrimination against women. A state's failure to respond appropriately to forms of private violence that are experienced overwhelmingly by women is in violation of the state's obligations to provide equal protection of the law and is consequently discriminatory against women.

The Inter-American Court of Human Rights has now joined and reaffirmed this important trajectory in international human rights law and the right of women to live free from all forms of violence in the *Campo Algodonero* case.[98] The Court for the first time found a state in violation of its affirmative obligations to respond to violence against women by private actors. The decision concerned three in a series of hundreds of unsolved and poorly investigated disappearances, rapes, and murders of young women in Ciudad Juarez on the U.S.-Mexican border. Significantly, the Court considered the human rights violations in Mexico within the context of mass violence against women and structural discrimination in Ciudad Juarez. The Court found that the "culture of discrimination" against women within the city had penetrated the response of State institutions to the alarming levels of violence against women, resulting in poor criminal investigations and the perpetuation of impunity for such violence.[99] Noteworthy also is that, drawing on the definition of violence against women of both the CEDAW Committee in its General Recommendation 19 and the Convention of Belém do Pará, the Court for the first time held that gender-based violence can constitute discrimination against women.[100] Mexico was ordered to comply with a broad set of remedial measures including a national memorial, renewed investigations, and reparations of over $200,000 each to the families in the suit.[101]

The implications of the *Campo Algodonero* decision for the Colombian context and more broadly are substantial. The Court's determination to consider individual incidents of violence against women within the context of mass violence against women and structural discrimination is highly pertinent to the Colombian context. This comprehensive and contextual approach to state complicity in perpetuating violence against women by private actors should draw attention and legal responsibility to the relationship between the State's role in negotiating the

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97 *See, e.g.*, AT v. Hungary, (Communication No. 2/2003), *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (Jan. 26, 2005); Andrew Byrnes & Eleanor Bath, *Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women*, 8 Hum. Rts. L. Rev. 517 (2008).

98 González and Others ("Campo Algodonero") vs. Mexico, Preliminary Considerations, Merits, Reparations and Costs, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

99 *Id.* paras. 399-400.

100 *Id.* paras. 395 & 402.

101 *Id.* Part IX, Reparations.

terms of demobilization of paramilitary actors and the alarming levels of public and private harms against women within the demobilization zones. While state actors may not be the direct perpetrators of these harms, and the range of harms identified goes beyond the abductions, torture, and killings by paramilitaries addressed in the *Mapiripán* case, the Colombian State has clear legal obligations to prevent, protect, investigate, punish, and compensate for the full range of public and private harms experienced by women within the demilitarization zones.

Conclusion: Humanitarian Law, International Human Rights Law, and Re-calibrating State Interests in the Negotiation of Transitional Justice

As we conclude this chapter we come back to the point at which the issues of accountability are most squarely on the table (or clearly absent from the table)—namely at the point of negotiation between state and non-state actors. While a peace deal may transform relations between violent actors, it will likely do very little for social relations within the zones controlled by particular groups of violent actors. A peace deal may also do very little to resolve the legal and structural ambiguities that pervade prior and continuing overlapping regimes of control that have characterized the conflicted non-state and state zones. The constructive ambiguity of the peace deal may in fact incorporate that tension and reality directly into new arrangements.[102] In Colombia, the DDR process is widely attributed with legitimating paramilitary social control, rather than ending it.[103] Moreover it is seen as giving rise to concern that the de facto black hole of accountability created by the paramilitaries has been institutionalized by the contemporary process. We suggest that political compromises at the heart of peace deals often involve unspoken compromises around private harms and—in effect—women's security, as borne out by the evidence of high levels of violence against women within demobilization zones. The lack of accountability for prior violations against women and others may be part of the stated trade-off for the end of public contestation between male combatants. Moreover, continued violence against women will not be viewed as undermining the basis of the "deal" itself and will be entirely incidental to its perceived success or failure. How do we address this reality?

We are not naive in presuming that gender is likely to move easily to center stage in such processes and dominate the "deals" that are made, despite the dictates of gender mainstreaming and UN Security Council Resolution 1325. Nonetheless,

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[102] Chrisitine Bell & Kathleeen Cavaunaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement*, 22 Fordham Int'l L.J. 1345 (1999).

[103] *See, e.g.*, Corporación Humanas, *supra* note 60, at 67.

in order to address the clear lacunae in gendered accountability we suggest some routes forward. The first is that feminists, policy makers, and others need to pay more attention to non-state actors, not only as perpetrators of violence but rather as entities of control and oversight. In this latter capacity, close attention needs to be given to the modalities of holding the non-state actor accountable, individually but also by affirming command and control responsibilities by commanders for their subordinates. Second, we revisit old but important territory in affirming the importance of holding non-state actors accountable under existing humanitarian law norms—specifically Common Article 3 of the Geneva Conventions applicable to non-international armed conflicts. Third, we encourage greater willingness to consider the relevance of minimum humanitarian standards to internal conflicts, particularly if such standards were to be gender-proofed and avoid the gendered gaps that proliferate treaty standards. Minimum standards might provide some buy-in from non-state groupings, and there is important precedent for such soft law norms crystallizing to constitute hard and binding rules.

Finally, in the arena of human rights obligations we argue that if due diligence obligations are brought to bear on states for violence against women in those zones of control ceded to the non-state actor, then legal and reputational costs to states could be made higher for compromises made when negotiating with non-state actors. This might prompt the recalibration of interests in negotiating these deals in the first place. This could mean that the reduction of public harms is not so readily traded for the persistence or exacerbation of a range of private harms. Indeed, the credible threat of imputed state liability for private harms perpetrated by paramilitary actors could mean that the material and symbolic benefits of inclusion (within the state) would, in a meaningful way, be made subject to principles of non-violence and non-discrimination against women. In sum, we urge greater attention to the non-state actor and greater attention to the capacity of human rights and humanitarian law, as well as transitional "deals," to hold such actors accountable for gendered harms committed during armed conflict.